APPENDIX "1"

NO. 80-1329

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. WYATT SKAINES, individually and d/b/a WYATT TIRE DISTRIBUTORS ..... *Plaintiff-Appellee*

v.

UNIROYAL, INC., formerly UNITED STATES RUBBER COMPANY ..... *Defendant-Appellant*

AMENDED ORDER

(Filed January 22, 1982) John Hehman, Clerk

BEFORE: EDWARDS and MARTIN, *Circuit Judges and* FEIKENS, *District Judge**

Uniroyal, Inc. ("Uniroyal"), defendant below, appeals from a jury verdict of $223,319 for price discrimination in violation of §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a). This verdict was trebled pursuant to §4 of the Clayton Act, 15 U.S.C. §15, and with the award of attorneys' fees in the amount of $106,250, the total recovery of Skaines, plaintiff below, was equal to $776,207; judgment was entered thereon by the United States District Court for the Western District of Tennessee.

On June 24, 1968, Skaines entered into a "Peerless Distributor Franchise Agreement" with Uniroyal concomi-

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*The Honorable John Feikens, Chief Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

tantly with a book balance plan.* Prior to entering the agreement with Uniroyal, Skaines drew up a worksheet with three sales representatives of the tire company to project expenses and profits for the business for the year between July 1, 1968 and June 30, 1969. The "Financial and Operating Budget" anticipated a total annual income before taxes for the first year of $22,456.

The venture did not succeed and this lawsuit ensued in which Skaines claimed price discrimination by Uniroyal as a cause. He claimed tires were being sold by Uniroyal to him at a higher price than to United Tire & Rubber Company ("United"), another tire distributor in Memphis. Upon trial the jury concluded that the tires that were supplied to United were of like grade and quality as those supplied to Skaines, albeit they were sold in some instances under different labels, and found price discrimination. A verdict was returned for Skaines.

Uniroyal moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The standards for review of the motions are similar but not identical. To determine if a judgment notwithstanding the verdict is proper, the evidence must be viewed in the light most favorable to the party that secured the jury verdict and reasonable minds must not differ as to the conclusions to be drawn from the evidence. *Woodruff v. Tomlin*, 616 F.2d 924, 934 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Gilham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). In this case, there was sufficient question as to whether the tires were of like grade and quality to require a determination by a trier of fact. The

*Under this plan, Skaines was required to contribute $10,000 to the venture and Uniroyal supplied a $20,000 tire inventory.

decision of the District Court denying Appellant's motion for judgment notwithstanding the verdict is affirmed.

On appeal, the reviewing court must only reverse the District Court's denial of a new trial if it appears that that court abused its discretion. *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967). In this instance, the District Court concluded that there was overwhelming evidence from which a jury could conclude that there had been a violation of the Robinson-Patman Act, even though it was of very short duration. Since the District Court had the benefit of hearing testimony that was presented in this case, as did the jury, we are not inclined to overturn its ruling that the verdict was not against the great weight of the evidence. Nor do we find error in the jury instructions pertaining to the element of "like kind and quality." The decision of the District Court denying Appellant's motions for a new trial on these issues is affirmed.

Having found liability for a violation under §2(a) of the Robinson-Patman Act, we turn to the question of damages. The jury awarded Skaines, in special verdicts, $1,150 for diverted sales, $16,969 in price differentials, and $205,200 in lost future profits. Appellant contends that the recent United States Supreme Court decision, *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 49 U.S.L.W. 4516 (May 18, 1981), limits a plaintiff's recovery to actual damages. We do not agree. The *Payne* decision states that damages are not presumed to result from a Robinson-Patman violation and, thus, "automatic" damages are not recoverable. It further holds that damage to a business is not, in and of itself, proof of a violation of §2(a) of the Robinson-Patman Act. We interpret *Payne* to mean that

proof of injury must be submitted from which, under proper instructions, a jury may find damage. Such an award may perhaps not be in the actual dollar amount of damage suffered, but because it is based on proof of injury and has been specifically found to be damage by the jury, cannot be characterized as automatic. A jury verdict so based is consonant with *Payne*. In so holding, the court in *Payne* relied on cases in which future profits were awarded as the result of Sherman Act violations and looked to the evidence presented by Payne in support of his claim of future profits.

The concept of recovery for lost profits is not without precedent. The statute that provides for recovery of treble damages does not distinguish between Sherman Act violations and Robinson-Patman Act violations. 15 U.S.C. §15, Clayton Act §4. An individual who is forced to close his business may recover lost future profits if he can show that the defendant's antitrust violation was the reason that the business was damaged. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 862 n.28 (5th Cir. 1981); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 45-47 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Farmington Dowell Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1970). However, while the amount of damages is not subject to a rigorous degree of proof, *Payne, supra*, at 4519; *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931), a plaintiff cannot be awarded damages that are purely conjectural and speculative. *Bigelow, supra*, at 264; *Lehrman, supra*, at 46. The problem that we face in this

case is similar to that faced by the courts in *Farmington Dowel, supra,* at 81, *Lehrman, supra,* at 45, and *Hanson v. Pittsburg Plate Glass Industries, Inc.,* 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974). In all instances, the jury was asked to speculate on the length of time that a plaintiff would have had a thriving business in the absence of the antitrust violation when the evidence only showed that the plaintiff lost money during the entire time of his venture. In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence. The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Unless Appellee agrees to remit $525,600 within thirty days of the entry of the order, the District Court should grant a new trial limited to the issue of damages. This finding means that the Appellee is awarded in specific damage for diverted sales $1,150; in specific damage for price differentials $16,969; and in specific damage for lost future profits $30,000 — all totalling $48,119. When the damages are trebled, Skaines will be entitled to receive $144,357 in damages and $106,250 attorneys' fees.

Accordingly, the decision of the District Court is affirmed in part and reversed and remanded in part for actions consistent with the decision of this court on damages.

ENTERED BY ORDER OF THE COURT.

/s/ John A. Hehman, Clerk

APPENDIX "2"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff*

vs. No. C-72-216

UNIROYAL, INC., formerly
UNITED STATES RUBBER CO. ..... *Defendant*

ORDER AWARDING ATTORNEYS' FEES, STATUTORY DAMAGES, AND JUDGMENT ON THE VERDICT

(Filed February 22, 1980)

Having overruled defendant's post-trial motion, the Court concludes that the total damages awarded by jury in the amount of $223,319 should be trebled in accordance with 15 U.S.C. 15 so that the plaintiff shall have a judgment against the defendant in the amount of $669,957.

In support of the application for attorneys' fees, the present attorney for the plaintiff, Bruce D. Brooke, has filed affidavits from five attorneys who have worked on the case, including himself, which reflect a total number of 971.1 hours devoted to the case. It should be noted that this does not include the time devoted to responding to the defendant's post-trial motions. Three of these affidavits also state the reasonable amount of the total fee to be $110,000, $110,000, and $150,000. There are also four additional affidavits from members of the Memphis and Shelby County Tennessee Bar who have found reasonable value

of the total services rendered to be $135,000, $125,000, $120,000, and $116,000 respectively. These are based upon in excess of 925 hours.

This Court is of the opinion that a reasonable fee for services covered by the affidavits is $125,000. This takes into account the fact that the time of two associates, Stambaugh and Minor, would not command as large a fee.

However, the time spent in this case includes substantial duplication due to a change of lead attorneys approximately 11 months before trial. This case was primarily handled after it was filed by Phillip Brooke. His affidavit reflects that he has devoted 444.1 hours to this case. In mid-1978, due to his health, he requested that he be relieved from further representation. Thereafter his brother Bruce D. Brooke became the primary attorney for the plaintiff. He devoted 340 hours to the case exclusive of the response to the post-trial motion of the defendant. Undoubtedly Bruce Brooke had to duplicate some of the services which his brother had performed. The Court of Appeals for the Sixth Circuit has approved the arbitrary method of deducting for duplication by applying a percentage to the total.* In this case the percentage factor should be 15%, which amounts to $10,750, thereby resulting in a total fee to be awarded of $106,250.

While the costs are allowable against the defendant, no bill of costs nor schedule of expenses has been filed. Therefore, the Court cannot rule upon that at this time.

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*Northcross v. Board of Education, Memphis City Schools, ____ F.2d ____ (C.A. 6th, 11-23-79).

In summary, it is hereby ORDERED that the Clerk will enter a judgment for the plaintiff in the amount of $669,957 and an award of attorneys' fees as part of the costs in the amount of $106,250.

ENTER: This 21st day of February 1980.

/s/ Robert M. McRae, Jr., Judge
United States District Court

APPENDIX "3"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff*

vs. No. C-72-216

UNIROYAL, INC., formerly
UNITED STATES RUBBER CO. ..... *Defendant*

RULING ON DEFENDANT'S MOTION FOR JUDGMENT N.O.V. OR A NEW TRIAL OR REMITTITUR

(Filed February 22, 1980)

This ruling pertains to the post-trial motions in this antitrust case brought pursuant to the Robinson-Patman Act wherein the jury rendered verdicts in favor of the plaintiff in the total amount of $223,319. Plaintiff seeks to have that sum trebled, and the defendant by its post-trial motion seeks to have a judgment notwithstanding the verdict, a new trial, or a remittitur.

Grounds I, II, and III attack the amount and weight of the evidence, with Ground III being based upon a charge of a verdict so excessive as to indicate prejudice on behalf of the jury. This Court concludes there is evidence to support the jury's findings. In fact the jury's verdict was substantially less than the amount contended for by the plaintiff.

Ground IV of defendant's motion is based upon a contention that the Court erred in not granting a mistrial

because the plaintiff "radically changed" his characterization of his alleged damages and the amount and basis of calculating the same. This contention by the defendant is completely contrary to the record in this cause. The defendant could have been aware of the plaintiff's proposed method of calculating damages as early as December 1, 1978. The defendant obtained a continuance of this matter in January 1979, allegedly for the purpose of carrying out discovery of the plaintiff's theories of damages. The defendant took no steps to determine the method of the plaintiff's calculation. Plaintiff's calculation was based upon the figures generated from the defendant's own records that reflected a substantial difference in prices given to the favored United Tire Company as against the prices extended to the plaintiff. The objection which the defendant raised at the time of the trial of the cause was that it would not have an opportunity to cross-examine the plaintiff about this calculation. In response to the defendant's request, the Court was willing to reopen the proof. The defendant further had its methods and systems analyst, Jack Hance, continuously available for assistance to attempt to develop any alleged rebuttal proof.

The defendant further claims as error Number V on the part of the Court, allowing the plaintiff to reopen his proof regarding price differentials. The Court's direction to the plaintiff to reopen the proof was as a result of the defendant's claim that the trier of fact would not be able to properly discern the evidence that had already been introduced. In the Court's discretionary authority to obtain justice and fairness in the trial, it directed that the plaintiff reopen its proof to cut down on the amount of the claim for price discrimination to the period wherein the alleged favored customer was in competition with the plaintiff.

Grounds VI through X allege errors of omission and commission on the part of the Court in the matter of the Court's instructions to the jury with regard to the troublesome principle of like grade and quality. At the trial and prior to the jury instructions considerable discussion and argument was devoted to the topic of like grade and quality. In addition to the problems common to most products, the automobile tire industry has its own pecularities such as the industry practice of selling "blemished" tires for reduced prices and the practice by the manufacturer of designating some regular tires as blemished in order to sell them quicker or to give a particular customer a favored position.

There was an additional problem peculiar to the proof in this case concerning truck tires. In some measure due to the defendant's tardiness in furnishing information, plaintiff's expert was not able to make some pretrial comparisons for the matter of truck tires. However, in the opinion of this Court, that went to the weight of the expert's testimony.

This Court is of the opinion that it instructed the jury in accordance with the applicable law in the light of the issues presented by the proofs offered.

Grounds XI, XII, and XIII allege errors of the Court with regard to the Court's rulings and jury instructions in the matter of how the amount originally claimed by plaintiff as compensation for his services was eliminated from the claimed amount of future lost profits and the corollary item of plaintiff's earnings in another field after his tire business was closed.

This Court required the plaintiff to remove from his claimed annual lost profits the sum of $9,000 which had

been inserted in projections prepared or approved by defendant personnel as appropriate compensation for the services to be rendered by the plaintiff to the tire dealership. This reduced the claimed net profit and hence the projected loss of future profits. This was the Court's attempt to have the jury determine the lost profits exclusive of the value of plaintiff's personal efforts because he had moved into another means of earning a living.

As Ground XIV, defendant contends that the Court erred in failing to instruct the jury that any verdict it might award would be trebled. The defendant argued this very same position during the time of trial and the Court ruled that there is no affirmative responsibility to mention trebling to the jury.

Ground XV charges that the Court erred as a matter of law because it allowed the jury to speculate as to the amount of plaintiff's damages in all the categories submitted to them: (1) lost profits on sales diverted from plaintiff; (2) differentials in prices the defendant charged United Tire and Rubber Co. versus the prices charged plaintiff; (3) plaintiff's lost future profits. This contention of the defendant is the same as there being a lack of evidence to support any verdict which awards damages.

(1) The jury found, pursuant to the interrogatory submitted, that the loss of profits on sales to customers during the period covered by the lawsuit were, in fact, proximately caused by the illegal price discrimination of the defendant. The plaintiff offered testimony that his basis for a high sales volume in September 1969 was the result of his willingness to lower his prices in order to compete with the prices extended by the defendant to its favored customer, United Tire Company. The jury's award

for this item was substantially below the proof relied upon by the plaintiff for this category of damages.

(2) In support of its attack on the damages based upon price differentials between the prices charged plaintiff and United Tire, the defendant has filed an affidavit of a paralegal, Victoria S. Baird, that purports to show that some of plaintiff's proof in this regard was inaccurate. This attack pertains to the proof that was offered when plaintiff was allowed to reopen the proof in order to present proof of a lesser amount of damages in the light of the Court's ruling on some of the proof.

Upon reopening of the proof, plaintiff testified that between July 25 and October 1969 he purchased 2,579 tires for $41,527.15, an average of $16.10 per tire; that United Tire and Rubber Co. purchased 5,645 tires for $53,751, an average of $9.52 per tire; and that plaintiff was claiming as damages the difference between the aforementioned average prices, $6.58 per tire, times 2,579 tires, or a total of $16,969. The jury awarded this amount as price differential damages.

In some respects the argument made from Mrs. Baird's affidavit is inaccurate and irrelevant. Otherwise, the inferences presently asserted are arguments which should have been presented to the jury.

(3) This attack is open upon the $205,000 portion of the verdict, which the jury found to be based upon loss of future profits. The attorney for the defendant argues that this award is speculative and excessive in that it is based upon a business that closed after 21 months, during which period there was never an annual profit. While this Court agrees that this is a substantial verdict, the Court believes

that the antitrust law provides that the loss of future profits is an allowable element of damages.

Initially, the plaintiff claimed $561,400 in damages for loss of his profits from the expected operation of the business for 25 years. This was based upon a projection of estimated expenses, sales, and profits prepared by knowledgeable officials of the defendant company and the plaintiff who had ten years of employment with defendant and other tire companies. This projection was made prior to the commencement of the operation of the violated dealership. The projection included $9,000 per year for the plaintiff, who was projected to be the owner-manager. Because the plaintiff has established himself in another type occupation the Court ruled that $9,000 per year should be removed from this part of plaintiff's damage claim. After that claim was removed, the plaintiff's remaining total claim for loss of future profits was $336,000. Therefore the $205,000 represents a further downward adjustment of the claim by the jury, which could have been based upon a number of different items such as some of the plaintiff's actual financial data, including profits for some months, or the value of money received now for loss of profits in the future.

This Court finds no basis for setting aside nor reducing this verdict.

Grounds XVI, XVII, XVIII, and XIX are also based upon claimed errors in the portion of the judgment based upon the damages awarded by the jury for the loss of future profits. These are, respectively, claims by the defendant of no showing of actual damages, the verdict is duplicative with damages for losses on diverted sales, the verdict was upon mathematically erroneous calculations and the

jury awarded too much money for the loss of future profits for a business that operated this short length of time and that had as little capital as the plaintiff's tire business had. As the Court heretofore indicated, the antitrust law recognizes loss of future profits as an element of damages. In this case there was exceptionally strong evidence of a violation of the Robinson-Patman Act, albeit of short duration. The case was a difficult one for the plaintiff to prove, due to defendant's inability to furnish adequate records. This Court believes that the matter was submitted to the jury in accordance with the law in the light of the evidence offered.

IT IS THEREFORE ORDERED that the motion of the defendant for a judgment notwithstanding the verdict or a new trial or a remittitur is hereby overruled.

ENTER: This 21st day of February 1980.

/s/ Robert M. McRae, Jr., Judge
United States District Court